UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

VISION OF ELK RIVER, INC.

and

Case 18-CA-19200

SUSIE STETLER, An Individual

Florence I. Brammer, Esq., (Region 18, NLRB) of Minneapolis, MN, for the General Counsel.

Thomas R. Revnew, Esq., and Jon S. Olson, Esq., of Minneapolis, MN, for the Respondent.

DECISION

Statement of the Case

Richard A. Scully, Administrative Law Judge. Upon a charge filed on November 9, 2009, by Susie Stetler, an individual, the Regional Director, Region 18, National Labor Relations Board (the Board), issued a complaint on February 11, 2010, alleging that Vision of Elk River, Inc. (Respondent) had committed certain violations of the National Labor Relations Act, as amended (the Act). Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Minneapolis, Minnesota, on March 16 through 19, 2010, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and Respondent have been given due consideration. Based on the entire record, and from my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

At all times material, Respondent was a Minnesota corporation with offices and places of business in Elk River and Rogers, Minnesota, providing services to the Elk River, Minnesota School District, including transporting students to schools by bus and providing charter services for school-related activities. During the calendar year 2009, Respondent, in the conduct of its business operations, derived gross revenues in excess of \$500,000 and purchased and received goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of Minnesota. Respondent admits, and I find, that at all times material it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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II. The Labor Organization Involved

Respondent admits, and I find, that at all times material, Service Employees International Union (SEIU), Local 284 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

Since 2000, Respondent has performed under a series of contracts with the Elk River School District (ERSD) providing transportation for it students. Respondent provides buses and drivers for what are referred to as "regular education" routes and buses, vans, drivers, and aides for what are referred to as "special education" routes.¹ The issues involved in this proceeding concern an August 2009 layoff of drivers and aides who worked on the special education routes. The parties agree that the layoffs were occasioned by a restructuring by ERSD of its transportation system which resulted in fewer drivers and aides being needed for the special education routes operating in the 2009–10 school year. There is no dispute that the layoffs were the result of an economic decision by ERSD to restructure its special education routes. However, the complaint alleges that Respondent selected certain drivers and aides for layoff in a discriminatory manner because those employees engaged in or were perceived to have engaged in protected concerted activities and support for the Union and/or because they cooperated with the Board in connection with the processing of a representation petition filed by the Union and the investigation of unfair labor practice charges in violation of Section 8(a)(3), (4), and (1) of the Act.

Counsel for the General Counsel contends that Respondent created and applied a matrix of components to be used in determining who in the special education department would be laid off that was designed to target certain employees because of their support for the Union and/or their cooperation with the Board. She asserts that the matrix Respondent used was unsupportable and subjective and was "designed, tweaked and manipulated" in order to reach the desired end of removing the five targeted individuals.

Respondent contends that there is no evidence that its decision to lay off the five alleged discriminatees was based on union animus, that the evidence fails to establish that it had knowledge of any protected activity on the part of one or more of the alleged discriminatees, and that the protected activities it did know about were so remote in time that there can be no causal connection with the layoffs in August 2009. It asserts that even though it may have made mistakes in applying the criteria of the matrix, there is no evidence that it violated the Act by selecting any of these five individuals for layoff.

Background Facts

Respondent was formed in January 2000 and has provided transportation services for ERSD since that date. It took over those duties from an entity known as Billmar Transportation which had a collective-bargaining relationship with the Union. There have been three attempts by the Union to organize Respondent's employees and representation elections have been held during the 2002-03, 2007-08, and the current school year. The Union also filed a number of unfair labor practices charges against Respondent.

¹ Respondent also provides a third type of service involving charter buses which is not directly involved here.

Mark Ostwald has been Respondent's general manager since its formation and has overall responsibility for oversight of its facilities, management staff, and employees. Brent Orr served as the manager of operations at the Elk River facility from July 2006 until June 2009, when he was laid off. Orr returned to work for Respondent as a consultant from mid-August to mid-October 2009, when Ostwald was incapacitated due to illness. Colleen Smith has been employed by Respondent since January 2000 and has served as its special education transportation coordinator for approximately eight years. In that position, she designs the special education routes, assigns drivers and aides to those routes and supervises those employees.

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Respondent and ERSD began negotiating a new contract during the early part of 2009. The resulting agreement changed what had been a "two-tier" system in which the school buses made two runs in the morning and two runs in the afternoon to a "three-tier" system in which the school buses made three runs in the morning and three in the afternoon. This resulted in the need for fewer buses to transport the students. In April 2009, ERSD also informed Respondent that it was changing the method for assigning aides to special education routes. Instead of there being an aide assigned to every special education route, an aide would be assigned only to a route on which there was a specific student need for one, which Orr has described as "a substantial departure from past practice." However, in an end of the 2008-09 school year communication to employees signed by Ostwald and Orr, Respondent advised them that although ERSD was proposing a number of significant changes in the transportation services being provided, "the company can offer a reasonable assurance of employment next fall to all employees who are willing to work with the company in positive and constructive ways in implementing the necessary changes."

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Operative Facts

On August 13, 2009, Respondent held its annual pre-school year meeting and training session for all employees. No special education route assignments were made at that time but there was no mention of any layoffs. Smith testified that she had not yet developed those routes because she had not received the information she needed to do so from ERSD. The route preparation process begins when Smith gets Requests for Special Transportation from ERSD. She said that in 2009 these requests began to trickle in during the last two weeks of August. Once she got the requests, which include the identity of the students, their addresses, any physical impairments, the schools, grades, the type of vehicle and any special equipment needed, and any other specific needs, she began to set up the routes. She said that it took her about two weeks of 10 to 16-hour days to accomplish this. The process differed from previous

to vehicles only when there was a specific need.

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Smith testified that it is not until after the routes are developed that she makes the assignments of the drivers and aides. In 2009, once she had the routes done, she found there were fewer routes than in previous years and that not all of the existing drivers and aides were needed to cover them. In order to determine who would be given routes and who would be laid off she used a matrix of components to rank the special education employees. The two lowest ranking drivers and three lowest ranking aides were laid off.

years because of the switch to the three-tier system and the fact that aides were to be assigned

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According to Smith, Orr provided her with a matrix that had previously been used in selecting regular education drivers for layoff as there had never been layoffs in the special education department. That version of the matrix took into consideration, seniority, the previous year's attendance and safety record, and whether the driver was willing to drive every day and in the morning and afternoon. Counsel for the General Counsel contends that the revised

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matrix that Smith developed and used was designed to achieve the end of eliminating the five alleged discriminatees inasmuch as if she used the matrix Orr provided their rankings would have allowed all of them to keep their jobs. Smith said she had to revise the matrix because it only applied to drivers and not to aides. She did not explain why she had to use a single matrix for what are significantly different positions with different responsibilities and which were ranked separately. Smith said that she took out the safety component, which provided for a score of up to 30 points out of 100, because there had been no accidents during the previous year. It is difficult to understand her reasoning, since numerous factors short of an actual accident would appear to have a bearing on an employee's overall safety record and safety was allegedly a primary concern of the Respondent. She also removed the components relating to willingness to work which also adversely impacted the discriminatees' scores and inserted two new categories, "professional relationships" and customer requests for a particular a driver and/or aide. This in effect removed two objective criteria and replaced them with two totally subjective criteria which enabled Smith to manipulate the scoring any way she chose since she alone determined what constituted a positive "professional relationship" and she alone knew whether a specific driver or aide was the subject of a customer request.

In a memorandum, dated August 31, 2009, Smith informed the special education drivers and aides that ERSD, in an effort to reduce expenditures, had "changed the general approach to special education transportation," resulting in fewer drivers and aides being needed for the 2009-10 school year. The memo states that in order "to ensure a fair procedure for assigning work" and to "provide the best staff possible for serving the transportation needs of special education students," a matrix had been developed to rank current drivers and aides and determine the order in which will be assigned available work. It states that the matrix takes into consideration "longevity with the company; attendance/dependability; professional relationships with district staff and students, patrons, and work colleagues, as well as special customer requests." It states that the drivers and aides "may request a copy of the matrix" and their "overall ranking on the work assignment list."

After applying the matrix criteria, Smith determined that drivers Susie Stetler and Anne Martin and aides Trudy Edick, Sharron Lynas, and Susan Walberg would be laid off. None of the five employees was actually formally notified by Respondent that they had been laid off. They learned of their fate when, as the start of the school year approached and they had not received route assignments, they called or went to the facility and were told that there no routes for them.

Analysis and Conclusions

The General Counsel contends that Respondent had targeted each of the five alleged discriminatees for removal from its employ because of their support for the Union and/or because they had cooperated with the Board in connection with an unfair labor practices charge that had been scheduled for hearing in July 2008 but was settled before the hearing commenced. Respondent asserts that the alleged discriminatees were laid off because there were not enough positions available in the 2009-10 school year and an evaluation of their work performance resulted in their being ranked lower than other employees competing for the same jobs.

In a case such as this, where the employer's motivation for a personnel action is in issue, it must analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980) enf'd 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 393 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must introduce persuasive evidence that animus toward protected

activity was a substantial or motivating factor in the employer's decision. Once that has been done, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even the absence of protected activity on the part of the employee. Manno Electric, 321 NLRB 278, 280 fn. 12 (1996). To sustain his initial burden, the General Counsel must show (1) that the employee has engaged in protected activity; (2) that the employer had 5 knowledge of that activity; and (3) that such activity was a substantial or motivating reason for the employer's adverse action. Naomi Knitting Plant, 328 NLRB 1279, 1281 (1999). In other words, there must be a motivational link or nexus between union animus and the adverse employment action. American Gardens Management Co., 338 NLRB 644, 645 (2002). Moreover, this nexus "must rest on something more than speculation and conjecture." Amcast 10 Automotive of Indiana, Inc., 348 NLRB 836, 839 (2006). Direct evidence of unlawful motivation is seldom available and it may be established by circumstantial evidence and the inferences drawn there from. E.g., Abbey Transportation Service, 284 NLRB 689, 701 (1987); FPC Mouldings, Inc. v. NLRB, 64 F. 3d 935, 942 (4th Cir. 1994); Shattuck Denn Mining Corp., 362 F.2d 466, 470 (9th Cir. 1966). 15

a. Employees' Union Support and Activity and Employer Knowledge

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Respondent contends that it had no knowledge that any of the five alleged disciminatees had engaged in any activity protected by the Act. As noted above, the Union has made three attempts to organize Respondent's employees and has filed several unfair labor practices charges against it. During the 2007 organizing campaign Trudy Edick attended union meetings, spoke to other employees about the Union, and solicited authorization cards. She wore a pro-Union button on her shirt at work and at the annual employee meeting. Her picture appeared in a Union newsletter distributed to employees who had signed authorization cards during the summer of 2007 and she was quoted as being in favor of union representation. Edick credibly testified that prior to the September 2007 representation election, she was called into Orr's office where manager James O'Neill was also present and there was a discussion about her union activity. They accused Edick of having disclosed to the Union a list of employee names and addresses which she had in connection with her involvement with the company newsletter.² O'Neill said that since all management employees had denied giving out the list, they assumed that it was Edick who did so. Later in 2007, Edick was again called into Orr's office where he accused her of having "pressed charges on him with the Union," a reference to a charge that was filed by the Union after the accusation that she had disclosed the list of employee names. In the summer of 2008, Orr posted in the break room and distributed a memorandum he had prepared "as an informational item for the employees" outlining "a history of charges, complaints and Union action" brought against Respondent by the Union which he said required it to divert resources that might have been used for other purposes such as the purchase new equipment or raising wages. Included was a charge arising from his accusations that Edick had disclosed confidential personnel information. Orr also noted that he had received a "cease and desist" letter from the SEIU by fax within three hours of his conversation with Edick about the list of names.

Despite this, Orr denied any knowledge that Edick had ever engaged in any union activity. He said that Edick had denied contacting the Union about disclosure of the list of names and that he "absolutely" believed her. Edick credibly testified that she told Orr she did not initiate the charge herself but had told union organizers about his accusations which led to the Union filing a charge. Moreover, as is discussed below, the evidence as a whole shows that

² According to Edick's credible testimony, she did not have a list of employees' addresses, only their names.

there was very little that was said or done by Respondent's employees concerning the workplace that did not promptly make its way to its managers. I find that Respondent was aware that Edick was a supporter of the Union and that she had engaged in protected activity.

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Susie Stetler was a driver at the Elk River facility before being laid off. She credibly testified that she had signed a union authorization card and spoke with employees about the Union. She said that she was asked questions about the Union at the Respondent's facility on a daily basis as she was one of the few current employees that had previously been a member of the Union. One of the charges filed by the Union in 2008 involved the discharge of an employee named Pauline Hirning. A hearing on the resulting complaint was scheduled to be held in July 2008 but the case was settled before the hearing opened. Stetler gave an affidavit to the Board in connection with the Hirning case and was subpoenaed to testify at the hearing. Stetler was driving a summer school route as a substitute and was scheduled to drive on the date of the hearing. She credibly testified that she told Smith that she had been subpoenaed and would need the day off and Smith said, "Okay."

Respondent presented testimony from its supervisors Orr and Smith who said that they had no knowledge of any protected activity on the part of Stetler or that she was involved with the Hirning unfair labor practices hearing. However, in Orr's "history of charges" memo he states:

On July 3, 2008, company dispatch was informed that an unknown number of employees, diving and assisting in summer school, were subpoenaed to appear at the hearing on July 16, 2008, on Hirning's behalf. Some employees indicated to dispatch that they would not be able to drive summer school on July 16, 2008 (the next to last day of summer school) because they would have to answer the subpoena.

There can be little doubt that Smith was the dispatch person to whom employees reported when they needed to be off from work and she was responsible for replacing them. Orr's memo admits that Respondent knew that employees had been subpoenaed to appear at the hearing and would not be able to work that day. The only source of this information would have been the employees themselves who told Smith they needed to be off. Respondent argues that because there is no notation in Smith's planner book in which she recorded time off requests and there is no written request for time off from Stetler in the record, Smith's claim of lack of knowledge should be believed. I do not agree. Although Orr claimed he could not remember who told him about the subpoenaed employees or who they were, he admittedly got his information from "dispatch" (Smith) who knew which employees had been subpoenaed and had requested to be off on July 16. I cannot credit Smith's testimony that she was never informed that Stetler had been subpoenaed and intended to testify at the Hirning hearing. Moreover, Orr's assertion that the employees were subpoenaed to testify "on Hirning's behalf" indicates that Respondent considered those employees to be supporters of Hirning and the Union. I find that Respondent had knowledge of Stetler's involvement with the Board hearing and believed that she supported the Union.

Prior to being laid off Sharron Lynas was a special education aide. She was a member of the Union's organizing committee during its 2007 organizing campaign. She signed and participated in the hand delivery of a May 16, 2007 letter informing Respondent of that fact. Orr acknowledged that Lynas had been involved in the delivery of the letter in his office. Lynas also was pictured and quoted as being in favor of representation by the Union in the same Union newsletter in which Edick appeared and signed two letters distributed to employees to keep them updated during the summer. She hosted union meetings at her home and went door-to-door soliciting employees to sign authorization cards and to support the Union. Orr's "history of

charges" memo specifically mentions that union organizers were contacting employees at their home "to discuss unionizing the company." It is simply not believable that Respondent was not told the names of the employees making the home visits and that it did not know that Lynas was involved. I find that Respondent had knowledge of Lynas' union activity and support.

Anne Martin was a driver at the Elk River facility before being laid off. Lynas worked as the aide on Martin's bus. Martin testified that she signed an authorization card during the 2007 campaign, attended union meetings, and wore a pro-Union button throughout the day-long annual meeting and training session. Martin credibly testified that she was subpoenaed to testify at the Hirning hearing and that she informed Smith of this fact about two weeks before the July 16 hearing date. Once again Respondent claims that Smith's denial that she knew Martin had been subpoenaed and the fact that there is no notation in her planner or a time off request in the record should be credited over Martin's testimony. Again, I do not agree. The fact is, as attested to by Orr, Respondent knew that employees were subpoenaed and had requested time off from "dispatch." Respondent cannot explain how Orr could have known this if the employees had not informed Smith, the dispatch person who had to arrange for their substitutes, that they had been subpoenaed and needed to be off.

Susan Walberg was a special education bus aide for five years prior to her layoff. She had been the aide on Stetler's bus before being transferred to the Rogers facility for the 2007-08 school year. However, each day she drove back to the Elk River facility in order to have lunch there with her friends Stetler, Edick, and Martin. Walberg had signed a union authorization card and spoke with other employees about the Union but engaged in no other protected activity.

Although Respondent claims that it had no knowledge of any union activity on the part of any of the alleged discriminatees, I find that such knowledge has been established or can be inferred from the evidence in the record as a whole. There is direct evidence that Orr was aware of the Union involvement of Lynas and Edick and that Smith and Orr knew that Stetler and Martin were going to appear at the Hirning unfair labor practices hearing in support of the Union's charge against Respondent. It also knew that Walberg was a close friend and associate of the other four alleged discriminatees.

The employees in the special education department were a small group and apparently closely watched by Respondent's supervisors. Walberg testified that in May 2009 she called in sick one morning for the first time in two years. A matter of hours later, while at the doctor's office, she received a call on her cell phone from Smith who told her she had to get a note from the doctor even though it was company policy that a doctor's note was required only after three days of absence. Later that day, Smith told Walberg she would also need a note from the doctor saying that she was capable of performing her duties as an aide although there is nothing to suggest that Respondent had reason to believe she was impaired. When Walberg got a copy of her personnel file after her layoff, the doctor's note contained a notation indicating that Orr was the source of the note requirement and that O'Neill had also been involved. Respondent apparently contends that Walberg's sick leave request was questionable because it was in close proximity to a day of leave she had also requested. True or not, this incident demonstrates that Respondent closely monitored all aspects of the employees' activities and undermines its claim that it had no knowledge of their Union activity or support.

Another example of this involved Martin. She had a second job as a cashier at a department store where prior to the start of summer school in 2009 she encountered a teacher's aide from an ERSD school. While checking out her purchases, Martin had a brief conversation with the aide about whether Martin would be driving during the summer school session. Some version of this private conversation was reported to Respondent who accepted as true without

any further inquiry. On June 3, 2009, Smith issued a memo to employees stating that she had received a complaint about "inappropriate" comments and remarks made by a special education employee to ERSD personnel and threatening that if it happened again, the employee would be terminated immediately."

Yet another incident involved Stetler and Edick. Toward the end of the 2008-09 school year, special education employees planned a pot luck lunch at the Elk River facility. Stetler testified that she brought in a cake she had purchased early that morning on which was written, "It's a Good Day." After arriving at the facility she learned for the first time from a company newsletter that Orr had been laid off. She testified that the cake had nothing to do with Orr's layoff and that she made no comments to anyone relating it to his layoff. Prior to the afternoon routes, Ostwald approached Stetler and Edick at a picnic table and angrily accused them of bringing the cake to celebrate Orr's layoff. He described Orr as not just a manager but also a friend of his. He told them he considered childish behavior and said they would not have jobs there in the fall and should be looking for different work. Ostwald admitted that he had not seen the cake and did not even know what it said. He simply accepted the representations of an unidentified employee that Stetler and Edick brought it in to celebrate Orr's layoff.

It is against this background that Respondent's claims that it had no knowledge of any union activity or support on the part of any special education employee must be weighed. The evidence shows that Respondent was informed as to what those employees were doing, not only at its facilities, but in private conversations in non-work contexts. It shows that it was willing to accept such reports as true without any investigation or providing employees with an opportunity to explain. Under the circumstances I cannot credit its claims that it did not know or suspect union support on the part of employees who were identified as on the Union's organizing committee, who wore pro-Union buttons to company meetings, who solicited authorization cards from company employees, who spoke to employees about the Union on its vehicles and in its facilities, who made it known that they were going to appear at an NLRB hearing as witnesses in support of the Union's charges, or who were closely aligned with such employees.

b. Evidence of Animus and Its Relationship to the Layoffs

Terry Forner was previously employed by Respondent for five years as a field trip driver. He was employed during two of the Union's organizing drives and described himself as "very anti-union." He testified that on June 7, 2007, the last day of the school year there was an employee picnic. Forner testified that there was union organizing going on and that he had a conversation with Orr in the parking lot in which he asked Orr what he was going to do about "the union people." Orr responded, "we have to be really really careful how we get rid of them." Forner said he also had a conversation with Ostwald on the same day in which asked how Ostwald was going to take care of the union people. Ostwald responded that he wanted to get rid of them at the time of the last union vote, but that Arlene Cunningham, a former manager, talked them out of it. Forner also testified that in September of 2007, a week after the Union lost that representation election, he had a conversation with Orr in his office at which O'Neill was also present. Orr told Forner to write up employee Pauline Hirning for talking to Forner about the Union. Former said he would but never did so.

Ostwald generally denied having any conversations with Forner concerning unions. I do not credit his denials which lacked any detail or context. They consisted entirely of monosyllabic answers to leading questions by Respondent's counsel which incorrectly paraphrased some of Forner's testimony. The same is true of Orr. He generally denied speaking to Forner about getting rid of union supporters, saying, "I don't think I ever had that

kind of conversation with Mr. Forner, no." He also denied asking Forner to write up Hirning. As was the case with Ostwald, Orr's denials were elicited through leading questions by Respondent's counsel which lacked context and incorrectly paraphrased some of Forner's testimony.

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I find Respondent's attacks on Forner's credibility as a "disgruntled employee" with a "grudge" against it are not persuasive. The evidence shows that Forner quit his job with Respondent after being questioned about a verbal altercation with a museum guard about parking a bus during a field trip. He may well have "a temper," as indicated by his precipitously quitting his job when by his understanding he was falsely accused of wrongdoing by a third party, but there is no evidence suggesting that he harbors such ill-will toward Respondent that he would be willing to commit perjury. Likewise, there is nothing to support Respondent's contention that Forner voluntarily came forward during the Board's investigation "for the purpose of satisfying his grudge." Forner gave credible and detailed testimony about his conversations with Ostwald and Orr, which was countered by their general denials. Orr did testify that he was not Forner's direct supervisor and would have been unlikely to have the kind of conversation about Hirning that Forner described. On the other hand, there is no reason for Forner to have testified that O'Neill was present during the conversation with Orr involving Hirning if he was fabricating it. O'Neill made two appearances to testify during the hearing but was not asked about the Hirning conversation which suggests his testimony would not have supported Respondent's position.

Although I credit Forner's testimony, the comments by Ostwald and Orr about getting rid of Union supporters were made over two years before the instant layoffs and at least in the case of Ostwald contained no actual threat. When these layoffs occurred Ostwald was incapacitated by a serious illness and clearly had no active involvement in the layoff decisions. At that point, Orr had himself been laid off and had briefly returned on a consulting basis because of Ostwald's illness. Under the circumstances, I cannot conclude, as the General Counsel contends, that these layoffs were the culmination of a long-term, sophisticated plan whereby Respondent bided its time and lay in wait for "the appropriate occasion to work its will" by weeding out Union supporters. This particularly true since the "appropriate occasion," the genuine need to layoff employees, is not disputed and resulted from ERSD's decisions not Respondent's.

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I find there nothing else in the record to establish that Respondent harbored union animus at the time the instant layoffs occurred. Although over the years the Union had made more than one attempt to organize Respondent's employees and had filed a number of unfair labor practices charges against it, there have been no findings that it has violated the Act. Only one charge resulted in a complaint being issued and that case was settled prior to the hearing. Although counsel for the General Counsel asserts that Respondent has "distributed lengthy and sophisticated communications to its employees on the subject of union and other protected activity," including, Orr's "history of charges" memo, there are no independent allegations of any conduct violating Section 8(a)(1) in the complaint in this matter.

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The end of school year conversations Forner testified about occurred over two years prior to these layoffs and the "history of charges" memo was more than a year before. The Hirning hearing to which employees had been subpoenaed was scheduled to commence over a year before. Respondent relies on numerous cases in which the Board has found that such gaps in time between expressions of union animus and adverse personnel actions negated a finding that there was a nexus between the two. E.g., *Amcast Automotive of Indiana, Inc.*, supra; *Children's Services International*, 347 NLRB 67, 69 (2006); *Central Valley Meat Co.*, 346 NLRB 1078, 1079 (2006). I find nothing here which mandates a different result. There was a

significant lapse of time between the last evidence of any union animus by Respondent and the layoffs in August and September 2009 as well as the last evidence of protected activity by any of the alleged discriminatees and the layoffs.

Much of the General Counsel's evidence and argument in this case was devoted to establishing that the matrix of criteria Respondent used to determine who would be laid off was anything but an objective analysis of its employees' performance, was irrational and unjustifiable in many respects, and was applied in a careless and manipulative manner to target specific employees. I agree and find this to be the case. That being said, there is nothing in the design or application of that matrix that demonstrates current union animus or establishes the needed nexus between animus and the adverse personnel actions. It may raise suspicions, but that is not enough. I find there is much stronger evidence that Stetler and Edick were targeted for layoff because of their involvement in the cake incident at the close of the previous school year. Ostwald obviously believed, rightly or wrongly, that they were celebrating the layoff of his friend Orr and told them their jobs were in jeopardy because of it. Respondent also appears to have had it in for Martin because it believed she had what it considered an improper discussion with an ERSD employee when its contract negotiations with ERSD were at a delicate stage, just before the end of the previous school year. Neither of these incidents involved employee activity protected by the Act. Whether they constitute good reasons or bad reasons for Respondent's manipulating the matrix to rid itself of what it may have considered undesirable employees, they do not constitute reasons that violate the Act.

In summary, I find that the General Counsel has established that the alleged discriminatees had engaged in protected activity and that Respondent had knowledge of that activity. I also find that the evidence of union animus on Respondent's part is too remote to support an inference that it was the motivation for its decision to lay off any of the alleged discriminatees in 2009. Accordingly, I find that the General Counsel has not established a prima facie case by showing that there was a nexus between Respondent's union animus and the layoffs of the alleged discriminatees and I shall recommend that the complaint be dismissed.

Conclusions of Law

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
 - 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent did not commit any of the violations of Section 8(a)(3) and (1) of the Act alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

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ORDER³

The complaint is dismissed in its entirety.

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 ³ If no exceptions are filed as provided by Sec. 102.46 Of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec.
 50 102.48 of the Rules, be adopted by the Board and all objections shall be deemed waived for all purposes.